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Rediscovering the Bankruptcy and Insolvency Power: Political and Constitutional Challenges to the Bankruptcy Act, 1919-1929

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Rediscovering the Bankruptcy and Insolvency Power:

Political and Constitutional Challenges to the Canadian Bankruptcy Act, 1919-1929

Thomas G. W. Telfer*

[A]ll these questions—that is the rights of the parliament of Canada as against the provincial legislature to legislate in matters of bankruptcy--will in due course come before the judicial committee of the Privy Council.

*S.W. Jacobs, House of Commons Debates, 26 March 1923*¹

I. INTRODUCTION

The enactment of the Canadian *Bankruptcy Act of 1919*² created a great deal of optimism in the business and legal community. The new statute finally enabled Canada to join other civilized nations, like England and the United States, that embraced bankruptcy law as a permanent commercial statute.³ The idea of using a federal law to deal with debtors and creditors was new to the Canadian legal world in 1919. Although s. 91(21) of the *Constitution Act, 1867* granted Parliament exclusive jurisdiction over “Bankruptcy and Insolvency” the Dominion largely abandoned⁴ this federal power by repealing the

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¹ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1519 (Jacobs, George Etienne Cartier).

² *Bankruptcy Act of 1919*, SC 1919, c 36.

³ For examples of optimism in the business community see Review of Lewis Duncan, *The Law and Practice of Bankruptcy in Canada* (1922) 34 *Jurid Rev* 193; “Canada’s Bankruptcy Act”, *The Globe* (7 January 1920) 6; “Bankruptcy Act Will Help Business World: New Measure Wipes out Variety of Provincial Laws” *Financial Post* (5 July 1919) 13 at 16; FM Moffat, “Bankruptcy in Canada” *Financial Post* 21 (25 March 1927) 28; “Bankruptcy Act in Force July 1”, *The Globe* (6 January 1920) 2.

⁴ Parliament did not completely abandon the field as it enacted legislation in 1882 to deal with insolvent trading companies and banks: Thomas GW Telfer & Bruce L Welling, “The *Winding-Up and Restructuring Act*: Realigning Insolvency’s Orphan to the Modern Law Reform Process” (2008) 24 *BFLR* 234 at 235.

*Insolvent Act*⁵ in 1880⁶ thereby enabling the provinces to pass debtor creditor legislation. In 1919, there was an assumption that the new national bankruptcy law would improve upon non-uniform provincial law.⁷ In the early 1920s, many lawyers believed that the federal power was meant to be read broadly such that it would allow the Dominion to interfere with provincial jurisdiction over property and civil rights to make the *Bankruptcy Act* more workable.⁸

From today's perspective, the legal and business community's optimism was well placed. The *Bankruptcy Act of 1919* has become Canada's founding bankruptcy statute and it established a permanent bankruptcy regime. On the constitutional side, if we look at the evolution of the bankruptcy and insolvency power over the longer term, from 1919 "there has been a progressive expansion of the federal presence in the field."⁹ However, the permanency of the *Bankruptcy Act* and a broad interpretation of the bankruptcy power were not inevitable or predictable outcomes in 1920. Some questioned Parliament's ability to pass legislation that interfered with decades old provincial debtor creditor law.¹⁰

⁵ *Insolvent Act of 1875*, SC 1875, c 16.

⁶ *An Act to Repeal the Acts Respecting Insolvency Now in Force in Canada*, SC 1880, c 1. For the reasons for repeal and the 1919 revival of bankruptcy law see Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2014).

⁷ "Dominion Association of Chartered Accountants: Address on *Bankruptcy Act*" 65:12 *Monetary Times* (17 September 1920) 5 at 8. See also FM Moffat, "Bankruptcy in Canada" 21 *Financial Post* (25 March 1927) 28. One aspect of the new Act was not uniform. Section 25 of the *Bankruptcy Act* relied upon provincial exemption law to determine exempt property in a bankruptcy. See Thomas GW Telfer, "The Evolution of Bankruptcy Exemption Law in Canada 1867-1919: The Triumph of the Provincial Model" [2007] *Ann Rev Insol L* 593.

⁸ See e.g. Lewis Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at ix.

⁹ Roderick Wood, "The Paramountcy Principle in Bankruptcy and Insolvency Law: The Latest Word (2016) 58 *CBLJ* 27 at 29.

¹⁰ Perhaps this is not surprising. Peter Hogg and Wade Wright note that the enumerated federal bankruptcy and insolvency power was a subject matter that would "otherwise have come within property and civil rights" jurisdiction of the provinces. Peter Hogg & Wade Wright, "Canadian Federalism, the Privy Council

Indeed, many Quebec legal thinkers did not welcome the new federal statute as they believed it to be a threat to the “purity of civil law.”¹¹

During 1922 and 1923, there were calls from inside and outside Parliament to repeal the *Bankruptcy Act of 1919*. Those seeking repeal sought to preserve provincial law from federal interference. This provincial rights’ perspective ultimately surfaced in constitutional cases where litigants sought to protect the property and civil rights jurisdiction of the provinces from the intrusion of the *Bankruptcy Act*. In the 1928 case of *Royal Bank v. Larue*¹² the Privy Council ended the debate by reaffirming a broad federal bankruptcy and insolvency power. Looking back from a long-term perspective, the outcome in *Larue* might seem inevitable. However, until *Larue* there was a great deal of uncertainty over the relationship between the federal bankruptcy power and provincial jurisdiction. After nearly forty years of provincial rule, the shift to a federal statute was an abrupt change for the provinces. The new federal bankruptcy order challenged entrenched provincial law, and provincial rights’ advocates saw it as an attack on carefully crafted provincial law that was more in tune with local needs.

This study examines the political and constitutional challenges to the *Bankruptcy Act* from 1919 to 1929. The paper focuses on the 1920s for several reasons. The

and the Supreme Court: Reflections on the Debate about Canadian Federalism” (2005) 38:2 UBC L Rev 329 at 335.

¹¹ Sylvio Normand, “Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l’intégrité du droit civil” (1986-87) 32 McGill LJ 559 at 588. Original French: “Au Québec, les juristes accueillent froidement la nouvelle loi, y voyant une menace évidente à la pureté du droit civil.” [translated by author]. See also Louis-A. Pouliot, “Law Loi de Faillite et les Lois Provinciales” (1926-27) 5 R du D 104 at 110, 114; Louis-A. Pouliot, “La Loi de Faillite et les Lois Provinciales” (1926-27) 5 R du D 142 at 146.

¹² *Royal Bank of Canada v Larue* [1928] AC 187, 8 CBR 579 (PC).

Bankruptcy Act of 1919 and the creation of the Superintendent of Bankruptcy in 1932¹³ are important legislative milestones but in the literature there is little discussion of bankruptcy law during the 1920s. This decade provides an opportunity to study how the legal and business community responded to Parliament's rediscovery of the federal bankruptcy and insolvency power. The new *Bankruptcy Act of 1919* provided a new constitutional battle-ground for those seeking to preserve provincial law from federal interference. Since *Royal Bank v. Larue* ruled in favour of a broad bankruptcy power in 1928 it provides the end-point of the study. The Great Depression is a distinct and separate chapter in the life of Canadian bankruptcy law and federalism.¹⁴

The paper is divided into seven Parts. Part II provides the economic context of the 1920s and includes official bankruptcy statistics for the decade. Part III provides the necessary constitutional law background by highlighting key nineteenth century cases on the bankruptcy power. In Part IV, the paper considers how the legal and business community defended a broad federal bankruptcy power. In contrast, Part V examines the provincial rights' response to the new *Bankruptcy Act* found in the political debates of the Québec National Assembly and the House of Commons. Part VI details the constitutional challenges to the federal bankruptcy power through an examination of reported case law from the 1920s. Part VII concludes.

¹³ *An Act to amend The Bankruptcy Act*, SC 1932, c 39.

¹⁴ Parliament responded to the Great Depression with the *Companies' Creditors Arrangement Act*, SC 1933, c 36 and the *Farmers' Creditors Arrangement Act*, SC 1934, c 53. On the constitutional litigation during the Great Depression legislation see: Virginia Torrie, "Protagonists of Company Reorganization: A History of the Companies' Creditors Arrangement (Canada) and the Role of Large Secured Creditors" (PhD Thesis, University of Kent, 2015) at 118-127. See *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] SCR 659, [1934] 4 DLR 75; *British Columbia (Attorney General) v Canada (Attorney General)*, [1936] SCR 384, 17 CBR 359, aff'd [1937] AC 391, [1937] 1 DLR 695 (PC).

II. THE ECONOMIC CONTEXT AND THE BRAVE NEW WORLD OF BANKRUPTCY LAW

To better understand the challenges to the bankruptcy regime in the 1920s some economic context is necessary. The economy struggled during the “Stuttering Twenties” with a depression causing severe unemployment.¹⁵ For some areas of the country, economic devastation started during the First World War. Southeastern Alberta and southwestern Saskatchewan faced a severe drought in the decade following 1916.¹⁶ In 1921, the *Queen’s Quarterly* reported that Canada was “somewhere near the middle of the business depression.”¹⁷ The severe downturn lasted until 1925.¹⁸

The depression in the early 1920s is reflected in official bankruptcy statistics from the Department of Trade and Commerce.¹⁹ In 1922, the number of bankruptcies peaked at

¹⁵ Michael Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland & Stewart, 1987) at 381, 384. In 1923, the Home Bank of Canada, with seventy branches, failed. Lawrence Kryzanowski and Gordon S. Roberts, “Canadian Banking Solvency, 1922-1940” (1993) 25: 3 *J Money, Credit & Banking* 361 at 364. See *Home Bank of Canada, Re*, [1923] 54 O.L.R. 606, 4 DLR 891, (Ont. H.C.) cited in Stephanie Ben-Ishai, “Bank Bankruptcy in Canada: A Comparative Perspective” (2009) BFLR 25 at 60.

¹⁶ See David C Jones, “We’ll All be Buried Down Here” *The Prairie Dryland Disaster 1917-1926* (Calgary: Historical Society of Alberta, 1986) at xxix; David C. Jones, *Empire of Dust: Settling and Abandoning the Prairie Dry Belt* (Edmonton: University of Alberta Press, 1987); Curtis R McManus, *Happyland: A History of the ‘Dirty Thirties in Saskatchewan, 1914-1937* (Calgary, University of Calgary Press, 2011).

¹⁷ “Business Cycles and the Depression of 1920-21” (1921) 29 *Queen’s Quarterly* 60. See also Angus Lyell, “The Bankruptcy Act in Operation” 66:2 *Monetary Times* (14 January 1921) 26; HP Grundy, “Bankruptcy Act a Real Benefit” 78:24 *Monetary Times* (17 June 1927) 14.

¹⁸ James Struthers, “Prelude to the Depression: The Federal Government and Unemployment, 1918-29” (1977) 58:3 *Can Hist Rev* 277.

¹⁹ 1921 is the first full year under the new bankruptcy regime since it came into effect on July 1, 1920. For bankruptcy statistics for the calendar year 1921, see *House of Commons Debates*, 14th Parl, 2nd Sess, vol I (8 March 1923) at 938. For bankruptcy statistics for 1922 to 1924, see Canada, Department of Trade and Commerce, Dominion Bureau of Statistics, “Commercial Failures in Canada December 1925”, (Ottawa: DTC, 1925) at 7; for 1925 to 1931, see Canada, Department of Trade and Commerce, Dominion Bureau of Statistics, “Commercial Failures in Canada for December 1931 With Totals for the Calendar Year 1931”, (Ottawa: DTC, 1932) at 8.

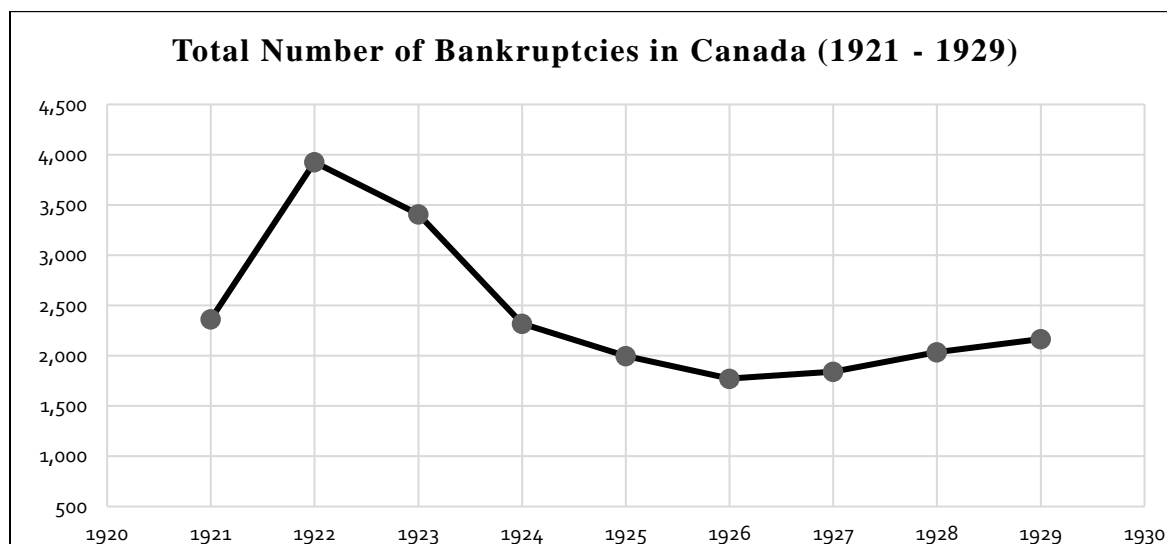
3,925. Bankruptcies never reached this level during the Great Depression.²⁰ The bankruptcy statistics did not go unnoticed. In 1923, a Member of Parliament referred to the rising bankruptcy numbers as “an enormous total in a land of unlimited resources, a land whose people are willing workers, a land...which offers every possible stimulus to progress.”²¹ Within two years of the *Bankruptcy Act* coming into force Canada experienced a significant bankruptcy crisis. This may have contributed to the belief that there was something inherently wrong with the bankruptcy regime.

²⁰ For bankruptcy statistics for 1932 to 1941, see Canada, Department of Trade and Commerce, Dominion Bureau of Statistics, “Commercial Failures in Canada in the Calendar Year 1941 and in December 1941”, (Ottawa: DTC, 1942) at 3.

²¹ *House of Commons Debates*, 14th Parl, 2nd Sess, vol I (26 February 1923) at 648.

Total Number of Reported Bankruptcies in Canada
(1921 – 1929)

Year	Total Number of Bankruptcies
1921	2,364
1922	3,925
1923	3,408
1924	2,319
1925	1,996
1926	1,773
1927	1,841
1928	2,037
1929	2,167



Rising numbers of bankruptcies in the early twenties occurred at a time when the provisions of the *Bankruptcy Act* were only becoming known. The absence of a national bankruptcy law for nearly forty years meant that there was a lack of expertise among lawyers and trustees in bankruptcy. A *Canadian Law Times* book review acknowledged that “few in the Legal Profession of Canada know anything of

Bankruptcy Law in operation.”²² Lawyers “owing to the novelty of the Law, are just familiarizing themselves with it.”²³

The new legislation created interpretative challenges. The legal community understood that the *Bankruptcy Act* was not a self-contained code²⁴ and that to discover the meaning of the statute one had to resort to case law.²⁵ But early commentary lamented that little case law had yet to emerge.²⁶ The uncertainty ushered in by the new Act is best illustrated by a 1921 book review of an English²⁷ bankruptcy text published in the *Canada Law Journal*. The reviewer suggested that the English book might offer some interpretative assistance:

We of this Dominion are now again paddling our little canoe in the troubled waters of insolvency, and will be glad of any assistance for our new venture as set forth in the Dominion Statutes of 1920, in the Act which came into force on July 1st of this year.²⁸

Lawyers practicing in the French language faced a further problem. In January 1922, Lewis Duncan reported in his bankruptcy text that “owing to prevailing prices,

²² Book Review of *A Short View of Bankruptcy Laws* by Edward Mason, (1920) 40 Can L Times 1058 at 1058. See also Angus Lyell, “The Bankruptcy Act and its Defects” 33:10 *Saturday Night* (20 December 1919) 27

²³ Book Review of *The Law and Practice of Bankruptcy Law in Canada* by Lewis Duncan, (1922) 42 Can L Times 215.

²⁴ Professor JT Herbert, “An Unsolicited Report on Legal Education in Canada” (1921) 41 Can L Times 593.

²⁵ Professor JT Herbert, “An Unsolicited Report on Legal Education in Canada” (1921) 41 Can L Times 593.

²⁶ Book Review of *The Law and Practice in Bankruptcy*, 12th ed, by Right Hon RL Vaughn-Williams & William Mansell, (1921) 57:12 Can LJ 286.

²⁷ The Canadian Bankruptcy Act of 1919 was based upon the English *Bankruptcy Act* of 1914, however, there were significant differences. Duncan, in his text, made no apologies for relying upon English case law. See Lewis Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at viii.

²⁸ Book Review of *The Law and Practice in Bankruptcy*, 12th ed, by Right Hon RL Vaughn-Williams & William Mansell, (1921) 57:12 Can LJ 286.

the publishers had not seen their way clear to print the French text of the Act and Rules.”²⁹ Parliament added to the chaos by amending the Act three times by the end of the 1922.³⁰ This caused Greenshields J. of the Québec Court of Appeal to state that during the “short period of life of the Act”³¹ Parliament had amended the Act such that “it is scarcely recognizable in its present form.” Greenshields J. urged that other amendments could be made “making clear what is evidently ambiguous.”³²

The rising number of bankruptcies and the uncertain state of the law left the legislation open to widespread criticism. Months after Parliament proclaimed the Act, the Toronto weekly, *Saturday Night* published an article entitled: “The *Bankruptcy Act* and its Defects”.³³ The author described the Act as “cumbersome”³⁴ and lamented its many “loopholes”.³⁵ *Saturday Night* published a follow up article entitled: “Present Canadian *Bankruptcy Act* will not Do”.³⁶ The article called for amendments to “clarify the obscurity which now hangs in a cloud” over the Act.³⁷ One author predicted

²⁹ Lewis Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at ix.

³⁰ *An Act to Amend the Bankruptcy Act*, SC 1920, c 34; *An Act to Amend the Bankruptcy Act*, SC 1921, c 17; *An Act to Amend the Bankruptcy Act*, SC 1922, c 8,

³¹ *John W Danforth v The Riordon Co.*, [1922] 1 DLR 843 at 852 (Que CA), rev’d on other grounds *Riordon Co v John W Danforth Co*, [1923] SCR 319.

³² *John W Danforth v The Riordon Co* [1922] 1 DLR 843 at 852 (Que CA), rev’d on other grounds *Riordon Co v John W Danforth Co*, [1923] SCR 319.

³³ Angus Lyell, “The Bankruptcy Act and its Defects” 33:10 *Saturday Night* 27 (20 December 1919) 27. During this era *Saturday Night* represented the views of “upper middle-class English-speaking Torontonians.” See Index to *Saturday Night*, Libris Canadiana, online: <www.Libris.ca>.

³⁴ Angus Lyell, “The Bankruptcy Act and its Defects” 33:10 *Saturday Night* (20 December 1919) 27.

³⁵ Angus Lyell, “The Bankruptcy Act and its Defects” 33:10 *Saturday Night* (20 December 1919) 27.

³⁶ Terence Sheard, “Present Canadian Bankruptcy Act Will Not Do”) 40:9 *Saturday Night* (17 January 1925) 13.

³⁷ Terence Sheard, “Present Canadian Bankruptcy Act Will Not Do” 40:9 *Saturday Night* (17 January 1925) 13 at 18.

“radical amendments” after one or two years of experience with the new Act.³⁸ The lack of government supervision of trustees in bankruptcy, who were responsible for administering bankrupt estates, also provided a source of opposition to the new legislation.³⁹ One author suggested that bankrupt estates “were actually administered by persons who had been convicted of offences or who were bankrupt.”⁴⁰

In the 1920s, critics of the *Bankruptcy Act* also drew upon the nineteenth century belief that debtors had a moral obligation to re-pay debts.⁴¹ Saskatchewan businesses raised the concern about the ease with which insolvent debtors could “pass through the Bankruptcy Court and escape their obligations.”⁴² The Regina *Leader* reported that in Saskatchewan debtors could declare bankruptcy every three months and then start business again after each bankruptcy filing. Too many debtors were getting back into bankruptcy “before they had spent sufficient time on the penitent bench.”⁴³ Thus, “whole moral fabric of business is being endangered” by debtor practices.⁴⁴ The Québec government complained that the *Bankruptcy Act* was too lenient and prevented

³⁸ Angus Lyell, “Bankruptcy Act in Operation” 66:2 *Monetary Times* (14 January 1921) 26. See also call for amendments in “The Bankruptcy Act” (1921) 57:2 *Can LJ* 41 at 44.

³⁹ Bram Thomson, “Canadian Bankruptcy Act—Monopoly of the Trusteeship and of the Law” (1921) 41 *Can LT* 96. The trustee problem will be considered in a future study: Thomas GW Telfer, “The New Bankruptcy ‘Detective Agency’? The Origins of the Superintendent of Bankruptcy in Great Depression Canada” *The Canadian Confederation: Past, Present, and Future Conference* (Université de Montréal, Québec May 16-18, 2017).

⁴⁰ Lewis Duncan, “The Bankruptcy Amendment Act of 1932” (1932) 2 *Fortnightly LJ* 83.

⁴¹ “Creditors Given Absolute Control under Bankruptcy” 17 *Financial Post* (1 June 1923) 13. See also “Repeated Bankruptcies” (1923) 3 *CBR* 721.

⁴² “Bankruptcy Should be Unprofitable” 17 *Financial Post* (9 March 1923) 10.

⁴³ “Bankruptcy Should be Unprofitable” Regina *Leader* as reported by 17 *Financial Post* (9 March 1923) 10.

⁴⁴ “Bankruptcy Should be Unprofitable” 17 *Financial Post* (9 March 1923) 10.

farmers from obtaining credit in the province.⁴⁵ Conversely, the legislation was criticized for making it too hard for debtors to access relief. In “drought-stricken prairie areas” insolvent farmers had difficulty in obtaining their discharge due to high fees and because of the obligation under the Act to keep proper books.⁴⁶ These beliefs cultivated popular feelings of mistrust in the new federal legislation.

Professor John Falconbridge published a powerful critique of the *Bankruptcy Act* in the *Canadian Bar Review* in 1926. The article, simply entitled “Why?”,⁴⁷ accumulated 17 detailed and largely technical interpretive questions that had emerged as Falconbridge prepared his Bankruptcy lectures for his Osgoode Hall class. Falconbridge called for a serious effort to improve the drafting of the Act.⁴⁸ Parliament sought to remedy the numerous defects by passing six amending Acts between 1920 and 1927.⁴⁹ However, such legislation could not forestall the provincial rights movement and constitutional litigation which would eventually end up before the Privy Council in 1928.

III. THE BANKRUPTCY AND INSOLVENCY POWER IN THE NINETEENTH CENTURY

To provide context for the political and constitutional challenges to the *Bankruptcy Act* in the 1920s it is necessary to briefly review nineteenth century

⁴⁵ Hector B McKinnon, “Bankruptcy Act Warmly Attacked” *The Globe* (18 July 1924) 3.

⁴⁶ Hector B McKinnon, “Bankruptcy Act Warmly Attacked” *The Globe* (18 July 1924) 3.

⁴⁷ John Falconbridge, “Why?” (1926) 4:10 *Can Bar Rev* 695.

⁴⁸ John Falconbridge, “Why?” (1926) 4:10 *Can Bar Rev* 695.

⁴⁹ *Act to Amend the Bankruptcy Act*, SC 1920, c 34; *Act to Amend the Bankruptcy Act*, SC 1921, c 17; *Act to Amend the Bankruptcy Act*, SC 1922, c 8; *Act to Amend the Bankruptcy Act*, SC 1923, c 31; *Act to Amend the Bankruptcy Act*, SC 1925, c 31; *Act Respecting Bankruptcy*, RSC 1927, c 11.

jurisprudence on the bankruptcy and insolvency power.⁵⁰ Two key nineteenth century decisions of the Privy Council influenced the direction of case law in the 1920s. In 1880, the Privy Council provided a very clear answer to the question of the relationship between the federal bankruptcy power and provincial jurisdiction over property and civil rights. In *Cushing v Dupuy*,⁵¹ the Privy Council concluded: “it would be impossible to advance a step”⁵² in bankruptcy proceedings “without interfering with and modifying some of the ordinary rights of property, and other civil rights.”⁵³

It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them.⁵⁴

The Privy Council effectively recognized that “the federal power over bankruptcy and insolvency could not be effective if it did not authorize substantial modifications of the ordinary rights of property and contract.”⁵⁵

With the repeal of the federal *Insolvent Act* in 1880, questions arose about the constitutionality of the provincial assignments and preferences legislation in the

⁵⁰ See also, Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2014) at 94-95, 116-125.

⁵¹ (1880), 5 App Cas 409.

⁵² *Cushing v Dupuy* (1880), 5 App Cas 409 at 415, 416.

⁵³ *Cushing v Dupuy* (1880), 5 App Cas 409 at 415, 416.

⁵⁴ *Cushing v Dupuy* (1880), 5 App Cas 409 at 415, 416. The Supreme Court of Canada in 1883 followed the lead of *Cushing v Dupuy* and adopted the principle that Parliament had a broad right under its bankruptcy power to interfere with property and civil rights. See *Shields v Peak* (1883) 8 S.C.R. 579.

⁵⁵ Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007) (loose-leaf updated 2015, release 1) ch 25 at 3.

absence of a federal bankruptcy statute.⁵⁶ In 1894, the Privy Council upheld a provision of an Ontario Act in *Ontario (Attorney General) v Canada (Attorney General)*[*Voluntary Assignments Case*].⁵⁷ The decision had two immediate impacts. First, it enabled the provincial era of debtor-creditor regulation to continue unscathed.⁵⁸ Second, the decision effectively stalled federal bankruptcy reform efforts. However, over the longer term, the case also had significant constitutional consequences for the interpretation of the federal bankruptcy power.

Given that the Privy Council did not find the provincial provision *ultra vires*, one might argue that the *Voluntary Assignments Case* interpreted the bankruptcy power narrowly.⁵⁹ Further, one might align the outcome in the case with a broader trend in federalism jurisprudence at the end of the nineteenth century that saw the Privy Council, under Lord Watson, limit the powers of Parliament.⁶⁰ However, a portion of the judgment supported a broad reading of the bankruptcy power.

⁵⁶ Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2014) at 116-126.

⁵⁷ [1894] AC 189 (PC).

⁵⁸ Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2014) at 122-126.

⁵⁹ Albert Bohémier, *Faillite et Insolvabilité*, vol 1, (Montreal: Éditions Thémis, 1992) at 24, cited in, Canada, Department of Justice, “Bankruptcy and Insolvency, by Albert Bohémier, a study presented to the Civil Law Section of the Department of Justice of Canada, online: <<http://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/bohemier/bankr-failli.html#ednref2>>. See also W Ivor Jennings, “Constitutional Interpretation: The Experience of Canada” (1937-38) 51 Harv L Rev 1 at 13. John T Saywell’s analysis of Lord Watson’s interjections during arguments demonstrates that the Board favoured allowing the provinces to act while the Dominion did not exercise its bankruptcy power. See John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History) at 130-132.

⁶⁰ JR Mallory, *Social Credit and the Federal Power in Canada* (University of Toronto Press, 1954) at 29. See also Peter Hogg & Wade Wright, “Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism” (2005) 38:2 UBC L Rev 329 at 339. See also John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History) at 114-116.

In 1894, leading constitutional scholar A.H.F. Lefroy⁶¹ concluded that the *Voluntary Assignments Case* “possesses much constitutional interest by reason of the dicta in the concluding portions”⁶² of the decision. In the second last paragraph of the judgment the Lord Chancellor,⁶³ Lord Herschell⁶⁴ took the opportunity to re-state the breadth of that federal bankruptcy power:

[A] system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature.

Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation in as much as such interference would affect the bankruptcy law of the Dominion Parliament.⁶⁵

Lefroy reasoned that the effect of this Privy Council statement was “one of the first instances of the Dominion Parliament ‘scoring’ before the Privy Council.”⁶⁶ Confident

⁶¹ See RCB Risk, “A.H.F. Lefroy: Common Law Thought in Late Nineteenth Century Canada—On Burying One’s Grandfather” in G Blaine Baker & Jim Phillips, eds, *A History of Canadian Legal Thought: Collected Essays* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2006) at 66.

⁶² AHF Lefroy, “The Privy Council on Bankruptcy” (1894) 30:6 Can LJ (NS) 182 at 186. Lord Herschell’s statement has also be characterized as *obiter* by a modern authority. See Pierre Carignan, “La Compétence Législative en Matière de Faillite et d’Insolvabilité” (1979) 57 Can Bar Rev 47 at 61.

⁶³ See RFV Heuston, *The Lives of the Lord Chancellors* (Oxford: Clarendon Press, 1964) at 102.

⁶⁴ Perhaps it is not surprising that Lord Herschell took the opportunity to emphasize the federal bankruptcy power. Before becoming Lord Chancellor, Farrer Herschell had served as Solicitor General at the time England enacted a comprehensive *Bankruptcy Act* in 1883 with many crediting his leading role in obtaining the passage of the Bill. See The Right Honourable Lord James of Hereford, “The Late Lord Herschell, In Memoriam” (1899) 1:2 J Soc Comp Legis n.s. 201 at 202. See also Patrick Polden, “Farrer Herschell” in HCG Matthew & Brian Harrison, eds, *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004); EM, “Builders of our Law: Lord Herschell” (1902-3) 2:2 Can L Rev 88 at 90. For a summary of a realist vision of statutory interpretation see Randal Graham, “What Judges Want: Judicial Self-interest and Statutory Interpretation” (2009) 30:1 Statute LR 38 at 42-51.

⁶⁵ *Ontario (Attorney General) v Canada (Attorney General)* [1894] AC 189 (PC) at para 27.

⁶⁶ AHF Lefroy, “The Privy Council on Bankruptcy” (1894) 30:6 Can LJ (NS) 182 at 193.

of the importance of this dicta, Lefroy concluded that in considering how much provincial jurisdiction might be “incidentally invaded”⁶⁷ by Parliament:

[T]heir lordships seem to have left it, in its relation to the provincial legislatures, almost in as happy a position as a man occupied towards his wife in the good old days, when he could say, “What is yours is mine, but what is mine's my own.”⁶⁸

In 1894, Lord Herschell’s statements on the scope of Dominion power did not have an immediate impact as there was no federal bankruptcy statute. But his dicta and the finding in *Cushing v Dupuy* would be locked away in the law books ready to be used whenever federal law was revived.⁶⁹ After Parliament enacted a new bankruptcy law in 1919, Lord Herschell’s dicta ultimately became entrenched as part of Canadian law.

IV. THE BANKRUPTCY POWER AT THE OUTSET OF THE 1920s

Defenders of a broad federal bankruptcy power at the beginning of the 1920s relied upon nineteenth century constitutional case law to address any concerns about the validity of the federal law and the possibility of encroaching upon provincial property and civil rights jurisdiction.⁷⁰ The drafter of the *Bankruptcy Act*, HP Grundy,⁷¹ published a “Synopsis of the Canadian Bankruptcy Act” in 1920.⁷² To

⁶⁷ AHF Lefroy, “The Privy Council on Bankruptcy” (1894) 30:6 Can LJ (NS) 182 at 193.

⁶⁸ AHF Lefroy, “The Privy Council on Bankruptcy” (1894) 30:6 Can LJ (NS) 182 at 193.

⁶⁹ See WHP Clement, *The Law of the Canadian Constitution*, 3rd ed (Toronto: Carswell, 1916) at 803-809; AHF Lefroy, *Canada's Federal System: Being a Treatise on Canadian Constitutional Law under the British North America Act* (Toronto: Carswell, 1913) at 288, 293.

⁷⁰ Justice Fisher, “The Bankruptcy Law of Canada” 73:3 *Monetary Times* (18 July 1924) 18.

⁷¹ For Grundy’s role in the drafting of the Act see Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2014) at 146.

⁷² HP Grundy, “A Synopsis of the Canadian Bankruptcy Act” (1920-21) 1 CBR 325.

answer the question of the constitutionality of the new Act, Grundy simply quoted from *Cushing v Dupuy* and the *Voluntary Assignments Case* and stated:

It would accordingly appear that in case any conflict should arise between the Dominion Act and any provincial Act on the subject of bankruptcy and insolvency or matters ancillary thereto, even if such ancillary matters would ordinarily be within the powers of the provincial legislation, the provisions of the Dominion Act would prevail.⁷³

J.A.C. Cameron, a Master in Chambers, Supreme Court of Ontario⁷⁴ published the first Canadian bankruptcy text in 1920.⁷⁵ Citing *Cushing v Dupuy* and the *Voluntary Assignments Case*, Cameron concluded that the *Bankruptcy Act of 1919* was a direct interference with provincial jurisdiction over property and civil rights. He asked, “has the Dominion Parliament jurisdiction to enact the present legislation? It is submitted that it has.”⁷⁶ Certain provisions of the Bankruptcy Act directly related to civil procedure and “would repeal by implication any conflicting provincial statutes.”⁷⁷ Specifically referring to Lord Herschell’s dicta in the *Voluntary Assignments Case* (although by 1920 the passage was embraced as a general principle and it was no longer referred to as dicta) Cameron reasoned that if provincial legislation had an effect of interfering with the *Bankruptcy Act* then such provincial legislation would be *ultra vires*.⁷⁸

⁷³ HP Grundy, “A Synopsis of the Canadian Bankruptcy Act” (1920-21) 1 CBR 325 at 327.

⁷⁴ “Law of Bankruptcy in Canada” (1920) 31:6 Trust Companies 627.

⁷⁵ JAC Cameron, *The Law of Bankruptcy in Canada* (Toronto: Canada Law Book, 1920).

⁷⁶ JAC Cameron, *The Law of Bankruptcy in Canada* (Toronto: Canada Law Book, 1920) at 3.

⁷⁷ JAC Cameron, *The Law of Bankruptcy in Canada* (Toronto: Canada Law Book, 1920) at 7.

⁷⁸ JAC Cameron, *The Law of Bankruptcy in Canada* (Toronto: Canada Law Book, 1920) at 8.

In 1922, Lewis Duncan, a Toronto lawyer,⁷⁹ published *The Law and Practice of Bankruptcy in Canada*.⁸⁰ Duncan also cited *Cushing v Dupuy* and the *Voluntary Assignments Case* to support a broad federal bankruptcy power. The *Voluntary Assignments Case* was of “considerable importance.”⁸¹ The case enabled Parliament to “pass complete and fully rounded legislation.”⁸²

Dominion provisions which are truly ancillary or...necessarily incidental to a general bankruptcy or insolvency law may effect a virtual repeal of provincial legislation. There can be no direct repeal; but if the two are in conflict the Dominion enactment must prevail.⁸³

It was inevitable that the defense of the federal power also involved direct attacks on provincial law and provincial jurisdiction since there were many provincial statutes that might infringe upon the newly exercised federal bankruptcy power. Federal law would do away with the “cumbersome and unsatisfactory” provincial law that involved “tedious delays and heavy expenses.”⁸⁴ However, criticisms of provincial law went beyond claims of inefficiency. On July 5, 1919 the *Financial Post* headline read, “Bankruptcy Act will Help Business World: New Measure Wipes out Variety of

⁷⁹ Lewis Duncan, would later challenge Lord Haldane’s view of Confederation in constitutional arguments before the Privy Council. See John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2002) at 163-64, 168, 179.

⁸⁰ Lewis Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922). Unlike Cameron’s work Duncan provided a substantial text of more than 700 pages. See Bram Thompson, Book Review of *The Law and Practice of Bankruptcy in Canada* by Lewis Duncan, (1922) 42 Can L Times 215. The reviewer claimed that the need for such a “reliable work” had become “urgent”.

⁸¹ Lewis Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 24.

⁸² Lewis Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 24.

⁸³ Lewis Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 24. The ability to rely on *Cushing v Dupuy* as a statement of the broad bankruptcy power was not accepted by all. See Louis-A Pouliot, “La Loi de Faillite et les Lois Provinciales” (1926-27) 5 R du D 104 at 114.

⁸⁴ “Canada’s Bankruptcy Act” *The Globe* (7 January 1920) 6.

Provincial Laws”.⁸⁵ In 1921, the *Monetary Times* stated: “there is no doubt that the Dominion statute rides across provincial enactments here and there.”⁸⁶ *The Globe* proclaimed that the *Bankruptcy Act* would “abrogate and annul existing Provincial laws.”⁸⁷

V. THE PROVINCIAL RESPONSE TO THE *BANKRUPTCY ACT OF 1919*

The attack on provincial law did not go unnoticed. In 1921, the *Monetary Times* reported that some of the provincial governments had complained that the *Bankruptcy Act* “overrides a good deal of provincial legislation.”⁸⁸ In that same year, the *Canada Law Times* published an article calling for the amendment of the *Bankruptcy Act* to make it clear that the administration of voluntary assignments and receiving orders were to be governed by “the general laws of the Province affecting the transfer of property.”⁸⁹

Two provinces forged ahead with their own means of debtor relief legislation. In response to the economic devastation in the West, Alberta and Saskatchewan passed debt adjustment legislation⁹⁰ designed to “relieve the distress of resident farmers.”⁹¹ The

⁸⁵ “Bankruptcy Act Will Help Business World: New Measure Wipes out Variety of Provincial Laws” 13 *Financial Post* (5 July 1919) 16.

⁸⁶ “Bankruptcy Act still in Process” 66:5 *Monetary Times* (4 February 1921) 8.

⁸⁷ “New Bankruptcy Bill would Give Uniformity” *The Globe* (3 April 1919) 12. While these business articles took the position that federal law overrode provincial law there was no express reference to the paramountcy doctrine. At best these articles sought to express the idea that federal law was paramount in more popular language. On paramountcy see Roderick Wood, “The Paramountcy Principle in Bankruptcy and Insolvency Law: The Latest Word (2016) 58 CBLJ 27.

⁸⁸ “Bankruptcy Act still in Process” 65:5 *Monetary Times* (4 February 1921) 8.

⁸⁹ “The Bankruptcy Act” (1921) 57:1 Can LJ 41.

⁹⁰ *The Drought Relief Act*, SA 1922, c 43; *The Debt Adjustment Act*, SA 1923, c 43; *The Debt Adjustment Act*, RSS 1928-29, c 53. For an overview of the operation of this legislation see Roderick Wood, “Enforcement Remedies of Creditors” (1994-96) 34 *Alta L Rev* 783 at 786; S David Cohen, “Law, Order and Democracy: An Analysis of the Judiciary in a Progressive State—the Saskatchewan Experience” (1992) 56 *Sask L Rev* 23 at 31. Debt adjustment legislation is also covered by RCC Cuming in his comprehensive

legislation protected the farmer from “execution and foreclosure” and gave administrative boards the “power to prevent a creditor from using oppressively the machinery provided by law to enable a creditor to assert his rights against his debtor.”⁹² Although the Alberta *Debt Adjustment Act* was ultimately ruled to be *ultra vires* by the Privy Council in 1943,⁹³ the debt adjustment legislation of the 1920s marked an aggressive move by two prairie provinces that must have considered the new *Bankruptcy Act* “insufficient or poorly suited to their regional needs.”⁹⁴

Politicians in the Quebec National Assembly and some Quebec Liberal MPs launched political attacks against the *Bankruptcy Act*. In challenging the new federal statute politicians also raised constitutional arguments against the federal bankruptcy power which they claimed interfered with provincial jurisdiction. These constitutional arguments, perhaps strategically raised in the political arena, eventually found their way into lower court constitutional judgments in Quebec. In December 1922, the National Assembly of Québec adopted a resolution inviting the federal government to revoke the *Bankruptcy Act of 1919*. According to the resolution, the Bankruptcy Act invited dishonesty, and fraud and ruined credit.⁹⁵ Members of the National Assembly were also

article, “Protection of Consumer-Borrowers—Limitations on the Remedies of Consumer-Lenders” (1968) 33 Sask L Rev 58 at 83-84.

⁹¹ *Re Debt Adjustment Act, 1937*, [1943] AC 356, 24 CBR 129 at para 2.

⁹² *Mutual Life Assurance Co v Levitt* [1939], 2 DLR 324, 1 WWR 530 at para 14 (Alta CA).

⁹³ *Re Debt Adjustment Act, 1937* [1943] AC 356, 24 CBR 129 (PC).

⁹⁴ Albert Bohémier, *Faillite et Insolvabilité*, vol 1, (Montreal: Éditions Thémis, 1992) at 24, cited in, Canada, Department of Justice, “Bankruptcy and Insolvency, by Albert Bohémier, a study presented to the Civil Law Section of the Department of Justice of Canada, online: <<http://www.justice.gc.ca/eng/rp-pr/csjsjc/harmonization/bohemier/bankr-failli.html#ednref2>>.

⁹⁵ Quebec, *Debates of the National Assembly*, 15th Leg, 4th Sess, (5 December 1922) (M Létourneau (Quebec-Est)); Quebec, *Debates of the National Assembly*, 15th Leg, 4th Sess, (18 December 1922).

concerned about the intrusiveness of the federal law and sought to defend Québec civil law. Louis Létourneau claimed that the federal bankruptcy law “makes litter of the spirit and letter of our codes.”⁹⁶ The forty-year experience of provincial jurisprudence under the Civil Code “was set to zero and replaced by federal legislation.”⁹⁷ Québec law relating to the transfer of property “was abolished and became a dead letter.”⁹⁸ Létourneau claimed that the *Bankruptcy Act* “violated the constitution of the country since it trampled underfoot the rights and prerogatives of the legislatures in matters of civil law.”⁹⁹ Québec Liberal Premier, Louis-Alexandre Taschereau¹⁰⁰ opened his speech with a direct attack on the federal bankruptcy law claiming it was “an *ultra vires* act”.¹⁰¹ He announced that he would convene a committee of Québec jurists to study the *Bankruptcy Act*. If the committee concluded that the bankruptcy legislation was unconstitutional, the government of Québec would challenge the legislation in the Supreme Court of Canada and the Privy Council. Taschereau promised to do everything possible to have the *Bankruptcy Act* set aside “and have the province return to the

⁹⁶ Quebec, Debates of the National Assembly, 15th Leg, 4th Sess, (5 December 1922) (M Létourneau) Original French: “la loi de faillite fait litière de l'esprit et de la lettre de nos Codes” [translated by author].

⁹⁷ Quebec, Debates of the National Assembly, 15th Leg, 4th Sess, (5 December 1922) (M Létourneau) Original French: “notre Code civil, était mise à néant et était remplacée par une législation fédérale” [translated by author].

⁹⁸ Quebec, Debates of the National Assembly, 15th Leg, 4th Sess, (5 December 1922) (M Létourneau) Original French: “toute notre loi de cession de biens était supprimée et devenait lettre morte” [translated by author].

⁹⁹ “Quebec Opposed to Bankruptcy Law” 70:5 *Monetary Times* (2 February 1923) 12.

¹⁰⁰ For Taschereau’s provincial rights perspective see Bernard L Vigo, *Quebec before Duplessis: The Political Career of Louis-Alexandre Taschereau* (Montreal: McGill-Queen’s University Press, 1986) at 144-45. For Taschereau’s opposition to the *Bankruptcy Act* see Vigo at 110.

¹⁰¹ Quebec, Debates of the National Assembly, 15th Legislature, 4th Sess, (18 December 1922) (M Taschereau (Montmorency)). Original French: “C’est une loi *ultra vires*” [translated by author].

provisions of the Civil Code in regard bankruptcy, and, once again, be master at home.”¹⁰²

Provincial rights arguments also surfaced in the House of Commons in 1923.¹⁰³ A number of Liberal Quebec MPs opposed the *Bankruptcy Act*.¹⁰⁴ On March 26, 1923, Quebec Liberal MP Pierre-François Casgrain moved that the *Bankruptcy Act* should be amended or abrogated.¹⁰⁵ While Casgrain criticized the law for being too easy on debtors and doing little to regulate trustees, he also took the position that the *Bankruptcy Act* “encroaches on our provincial law, on our civil code and procedure.”¹⁰⁶ The federal *Act* has been the source of trouble in Québec with Casgrain claiming that “we have been forced to spend large sums to ensure the maintenance of our rights” under provincial law.¹⁰⁷ Casgrain proposed that if the federal statute was not to be repealed then the *Bankruptcy Act* should not apply to Québec. In this way, the rights of Québec would be protected and it would allow for the civil code and code of civil procedure to be

¹⁰² “Quebec Opposed to Bankruptcy Law” 70:5 *Monetary Times* (2 February 1923) 12.

¹⁰³ This was not a new topic as Parliament had debated the constitutionality of the Bankruptcy Bill in 1918 and 1919 Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2014) at 150-55.

¹⁰⁴ Some of these Quebec MPs had been Laurier Liberals in the divisive federal election of 1917. Laurier had opposed joining the wartime Union coalition as he did not accept conscription. MPs Casgrain, Denis and Archambault, who are quoted in the text below, are all listed as Laurier Liberals in 1917 by the Library of Parliament. . See <http://www.lop.parl.gc.ca/>. See Robert Craig Brown & Ramsay Cook, *Canada 1896-1921: A Nation Transformed* (Toronto: McClelland & Stewart, 1974) at 269; JM Beck, *Pendulum of Power: Canada's Federal Elections* (Toronto: Prentice Hall, 1968) at 136-146.

¹⁰⁵ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1490 (Pierre Casgrain, Charlevoix-Montmorency). See “Bankruptcy Act Maybe Amended”, *The Globe and Mail* (27 March 1923) 9.

¹⁰⁶ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1496 (Pierre Casgrain, Charlevoix-Montmorency).

¹⁰⁷ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1499 (Pierre Casgrain, Charlevoix-Montmorency).

“maintained in integrity.”¹⁰⁸ A fellow Liberal MP from Québec, John Joseph Denis, urged the House not to force the federal legislation on Québec which “does not desire to accept” the law.¹⁰⁹

Legislators questioned the need for a federal *Bankruptcy Act* given that provincial debtor-creditor legislation had worked for forty years. Joseph Archambault, a Québec Liberal MP reminded the House that Québec civil law had adequately dealt with debtors but had now been practically “abolished by the federal *Bankruptcy Act*.”¹¹⁰ Archambault advocated for a return to provincial law as there was “no necessity for uniformity in a bankruptcy law.”¹¹¹ In his concluding remarks, Archambault strongly defended provincial jurisdiction: “I do submit that when the law of bankruptcy is so closely related to civil rights, the Dominion parliament should be very chary about legislating in this area.”¹¹² Paul Mercier, another Liberal MP from Québec, supported the retention of provincial law. Provincial law “had been enacted according to provincial necessities and customs.” In contrast, Parliament had constructed a bankruptcy law “for the whole Dominion...without consulting the provincial attorneys-general and the legislatures.”¹¹³ There was a fear in Québec that the bankruptcy legislation was part of a larger trend to centralize law at the expense of provincial jurisdiction:

¹⁰⁸ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1500 (Pierre Casgrain, Charlevoix-Montmorency).

¹⁰⁹ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1522 (John Joseph Denis).

¹¹⁰ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1504 (Joseph Archambault).

¹¹¹ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1504 (Joseph Archambault).

¹¹² *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1506 (Joseph Archambault).

¹¹³ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1508 (Paul Mercier).

The tendency to centralize and unify legislation is becoming more and more visible...and there seems to be an admitted attempt to encroach on provincial rights and attack our civil laws.¹¹⁴

In Quebec, there was also a belief that Parliament was seeking to impose English law on the province. In 1923, the *Monetary Times* published an editorial:

Quite probably Quebec would also be better satisfied were it not for the fact that the bankruptcy legislation is an effort to impose English law, and that this may be but the first effort for much other legislation of a like nature.¹¹⁵

John-Joseph Denis a Québec Liberal MP gave voice to this idea in the House of Commons in 1923 during the repeal debate. Denis pointed out that the Canadian *Bankruptcy Act* had been transplanted from England and that he opposed “the importation of laws from England.”¹¹⁶ The Act was a “replica of an English law, passed some forty years ago. We have had too much copying of English laws in this country.” Denis argued that conditions in Europe were much different than the situation in Canada. He objected to the bankruptcy law because it was “not suited to the people of Canada.” In particular, the *Bankruptcy Act* was “not suited to the requirements” of the Québec people.¹¹⁷ Casgrain, who had moved the motion for repeal concluded the debate by noting that Québec “is afraid of any invasion of English law under the new system.”¹¹⁸ Casgrain ultimately withdrew his repeal motion.¹¹⁹

¹¹⁴ Mr Galipeault, Quebec Minister of Public Works, Remarks at the Opening of City of Quebec Courts, September 1922 as quoted in *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1499 (Casgrain, Charlevoix-Montmorency).

¹¹⁵ Important Changes in Bankruptcy Now” 70:22 *Monetary Times* (1 June 1923) 5

¹¹⁶ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1520 (Jean-Joseph Denis)

¹¹⁷ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1520 (Jean-Joseph Denis).

¹¹⁸ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1528 (Pierre-François Casgrain).

¹¹⁹ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1528 (Pierre-François Casgrain).

The concerns raised by Quebec politicians were consistent with “traditional legal thought in Quebec.”¹²⁰ Sylvio Normand’s study of *Revue du Droit* articles published during the 1920s demonstrates that there was a “a dominant theme” of protecting “the integrity of civil law”.¹²¹ Quebec authors opposed the unification of Canadian law, appeals to the Privy Council and the spread of federal statutes.¹²² Bankruptcy law allowed the civil code to be infiltrated by “foreign law” through the use of jurisprudence from other provinces.¹²³ The *Bankruptcy Act* could “not cause a creditor to lose any rights or privileges” acquired under provincial law.¹²⁴ More importantly the new bankruptcy regime permitted bankrupts to obtain a discharge from their debts. Before 1919, this remedy was not available under provincial law. The *Bankruptcy Act*, therefore, interfered with Quebec civil law by introducing a new means of debt relief.¹²⁵ The only solution was repeal.¹²⁶

¹²⁰ Sylvio Normand, “Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l’intégrité du droit civil” (1986-87) 32 McGill LJ 559 at 559.

¹²¹ Sylvio Normand, “Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l’intégrité du droit civil” (1986-87) 32 McGill LJ 559 at 568.

¹²² Sylvio Normand, “Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l’intégrité du droit civil” (1986-87) 32 McGill LJ 559 at 578, 581.

¹²³ Sylvio Normand, “Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l’intégrité du droit civil” (1986-87) 32 McGill LJ 559 at 578, 581.

¹²⁴ Louis-A Pouliot, “La Loi de Faillite et les Lois Provinciales” (1926-27) 5 R du Droit 104 at 114.

¹²⁵ Sylvio Normand, “Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l’intégrité du droit civil” (1986-87) 32 McGill LJ 559 at 588. See also “Ouverture des tribunaux” (1923-24) 2 R du D 91; Léo Pelland, “L’Injustice dans les affaires” (1925-26) R du D 513 at 524, 525; Catherine Valcke, “Quebec Civil Law and Canadian Federalism” (1996) 21 Yale J Intl L 67 at 94.

¹²⁶ W. Deschênes, “La loi Canadienne des faillites” (1924) 26: 11 R du Notariat 321 at 335.

In the House of Commons federalists responded to the Quebec position.¹²⁷ SW Jacobs, also a Quebec Liberal MP,¹²⁸ challenged the Québec perspective of the Constitution offered by his colleagues in the House:

It is wrong for our people in...Quebec to say that the act, which the Parliament of Canada has a right to impose on the whole of the Dominion of Canada, is an attempt to take from the people of the province of Quebec their civil rights and their civil law.¹²⁹

Jacobs argued that it was not for the House of Commons to “sit in judgment and declare whether it was unconstitutional.”¹³⁰ Rather, Jacobs argued, that was the role of the courts.¹³¹

[A]ll these questions—that is the rights of the parliament of Canada, as against the provincial legislature, to legislate in matters of bankruptcy—will in due course come before the judicial committee of the Privy Council.¹³²

Jacobs was correct in his prediction with the Privy Council finally ruling in 1928 in favour of a broad bankruptcy power. However, before 1928 several lower court decisions challenged the federal intrusion into provincial matters. Some of the constitutional arguments found in the debates of the Québec National Assembly and in Parliament eventually found their way into Québec lower court judgments.

¹²⁷ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1501 (Hugh Guthrie).

¹²⁸ Jacobs, Liberal MP, had staunchly defended the original Bankruptcy Bill in 1918. See Canada, *Report of the Study Committee on Bankruptcy and Insolvency Law* (Ottawa: Queen’s Printer, 1970) at 16. See also SW Jacobs, “A Canadian Bankruptcy Act: Is it a Necessity” (1917) 37:8 Can LT 604. He was an expert in civil procedure. See SW Jacobs and Léon Garneau, *Code of Civil Procedure of the Province of Quebec* (Quebec, 1903).

¹²⁹ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1515-16 (Samuel William Jacobs).

¹³⁰ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1517 (Samuel William Jacobs).

¹³¹ *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1517 (Samuel William Jacobs).

¹³² *House of Commons Debates*, 14th Parl, 2nd Sess, vol II (26 March 1923) at 1519 (Samuel William Jacobs).

VI. THE BANKRUPTCY POWER INTERPRETED: CONSTITUTIONAL LITIGATION DURING THE 1920s

The question of whether to repeal the *Bankruptcy Act* soon gave way to constitutional litigation over the scope of the federal bankruptcy power. Perhaps this is not surprising. J.R. Mallory argues that new legislation inevitably produces litigation which seeks “to exploit the federal division of legislative powers in the constitution” as a way of “minimizing the change” created by the statute.¹³³ The change in this context involved the end of a near forty-year period of provincial regulation of debtor creditor matters without federal interference. After the long provincial era, the *Bankruptcy Act* marked “a very radical change.”¹³⁴ Those who hoped for an eventual Privy Council ruling in favour of the Dominion in the 1920s had to contend with the possibility that Lord Haldane, who served on the Privy Council until 1928, would hear an appeal on the scope of the bankruptcy power. Lord Haldane had played a dominant role in reshaping Canadian constitutional law and in his judgments Lord Haldane “subordinat[ed]... federal power to provincial power, whenever the language of the 1867 Act allowed.”¹³⁵ From Quebec there was an attempt to use Lord Haldane’s federalism jurisprudence to challenge the Privy Council’s nineteenth century characterization of a broad bankruptcy power.

¹³³ JR Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954) at 37.

¹³⁴ Editorial, “Bankruptcy” (1920) 40:7 Can LT 546. See also FGT Lucas, “The New ‘Bankruptcy Act’” (1920) 40:8 Can LT 668.

¹³⁵ David Schneiderman, “Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century” (1998) 48:4 UTLJ 521 at 554. See JR Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954) at 47-49; Frederick Vaughan, *Viscount Haldane: The Wicked Step-father of the Canadian Constitution* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2010) at 182-183 and John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2002) at 175-182.

One Quebec lawyer suggested that Privy Council jurisprudence had evolved since the 1880 decision of *Cushing v Dupuy*.¹³⁶ Relying upon a 1925 Lord Haldane judgment¹³⁷ the lawyer claimed that “the power of the provincial legislatures to regulate civil and property rights cannot easily be impeded.”¹³⁸ As the decade grew to a close, RCB Risk notes: “the Dominion’s powers seemed to many Canadians to be a pale image of what had been contemplated at Confederation.”¹³⁹ Would the bankruptcy power suffer the same fate? Some early decisions on the bankruptcy power did not favour the Dominion. The Quebec Superior Court found a provision of the *Bankruptcy Act* to be *ultra vires* and several other decisions cast doubt on the federal ability to interfere with property and civil rights.

A. EARLY CONSTITUTIONAL JURISPRUDENCE

Although nineteenth century jurisprudence favoured an extensive bankruptcy power, there was little consensus in early court rulings on the relationship between the *Bankruptcy Act* and provincial jurisdiction over property and civil rights. Some cases gave emphasis to the priority of federal law.¹⁴⁰ Thus, Justice Fisher of the Ontario Supreme Court characterized the 1880 decision of *Cushing v Dupuy* to mean that “the

¹³⁶ Louis-A Pouliot, “La Loi de Faillite et les Lois Provinciales” (1926-27) 5 R du D104 at 114.

¹³⁷ *Toronto Electric Commissioners v Snider*, [1925] AC 396 discussed in John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History (2002) at 179-182.

¹³⁸ Louis-A Pouliot, “La Loi de Faillite et les Lois Provinciales” (1926-27) 5 R du D 142 at 145.

¹³⁹ RCB Risk, “The Scholars and the Constitution: POGG and the Privy Council” in G Blaine Baker & Jim Phillips, eds, *A History of Canadian Legal Thought: Collected Essays* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2006) at 237.

¹⁴⁰ *Royal Bank v Kuproski* (1925), 7 CBR 8 at para 31, [1925] 3 DLR 744 (Alta CA), aff’d on other grounds [1926] SCR 532 (Parliament intended the *Bankruptcy Act* to “deal completely with the debtor’s estate.”); *Hamilton v Vipond* (1921), 1 CBR 483 at para 5, 61 DLR 466 (Ont SC) (an assignment for the benefit of creditors under provincial law was void under the *Bankruptcy Act*).

Parliament of Canada had the right to pass legislation pertaining to the subject of bankruptcy and insolvency and in doing so had the right to override provincial legislation.”¹⁴¹ However, not all courts initially accepted this premise with many decisions of the 1920s adopting a perspective that focused on preserving provincial law.¹⁴²

Whether the *Bankruptcy Act* overrode¹⁴³ provincial legislation was the essential issue before the Québec Court of Appeal in *Re Rosenzweig* in 1921.¹⁴⁴ Under provisions of the Québec Civil Code, an unpaid seller was entitled to the right of rescission against an insolvent trader.¹⁴⁵ In this case, the seller sold goods for an immediate cash payment of half of the selling price with the balance due within thirty days. On the day of the delivery the buyer became bankrupt leading the unpaid seller to assert a right of rescission under the Quebec Civil Code. The trustee refused to recognize the seller’s right of rescission and retained the goods for the benefit of the estate. The conflicting positions of the trustee and the seller forced the Court to consider was whether the bankruptcy of the buyer affected the right of the unpaid seller under provincial law. Lamothe C.J. asked

¹⁴¹ *Re Electrical Fittings & Foundry Co* (1926), 58 OLR 364 ,[1926] 1 DLR 752 (Ont SC) at para 14,

¹⁴² See e.g. *In re Churchill*, [1919] 2 WWR 541 at para 11 (Man KB) (provincial *Assignments Act* did not “trench on Dominion rights” and was not “in any sense a bankruptcy law.” See also *In re St. Thomas Cabinets Ltd* (1921) 1 CBR 521 at para 12 (Ont SC) (nothing in the Ontario *Bulk Sales Act* which brings it within “the field of bankruptcy legislation).

¹⁴³ Justice Fisher in *Re Electrical Fittings & Foundry Co* (1926), 58 OLR 364 [1926] 1 D.L.R. 752 (Ont SC) at para 14 used the language of overriding provincial law. This tracks the language found in the popular press. However, in an earlier passage in the case Justice Fisher refers to federal law being paramount. He states: “legislation of the Dominion Parliament so long as it strictly relates to the subjects enumerated in sec. 91 is of paramount authority even though to trench upon the matters assigned to the provincial Legislature by sec. 92.” at para 13.

¹⁴⁴ (1921) 2 CBR 255, 70 DLR 174 (Que CA).

¹⁴⁵ In order to exercise this remedy, Art 1543 provided that the goods had to still be in the possession of the trader and that the remedy had to be exercised within 30 days of delivery.

the question this way: “Has the new bankruptcy law made away with the privileged right conferred to the seller by Art. 1543, *Civil Code*?”¹⁴⁶ He answered the question by proclaiming that “there is no text of The Bankruptcy Act which says so.”¹⁴⁷ The trustee argued that the *Bankruptcy Act* “abolished by implication”¹⁴⁸ the unpaid seller’s right of rescission. Lamothe C.J. concluded: “Abrogation by implication, in civilized countries, is not easily admitted.”¹⁴⁹ Abrogation of rights arising under provincial law was “not to be presumed.”¹⁵⁰ In a concurring opinion Tellier J. offered a similar sentiment: “The Bankruptcy Act has effected no change in our former laws concerning sale. The privileged rights of the unpaid seller are still the same, they have not been affected.”¹⁵¹ The Court of Appeal concluded that the unpaid seller’s right of rescission survived the bankruptcy.¹⁵²

In 1923, the Québec Superior Court ruled that a provision of the *Bankruptcy Act* was *ultra vires*. In *Re Stober*, the terms of a commercial lease provided that in the event of the insolvency of the lessee, the lease became null and void. It was a further term of the agreement that the lease could not be assigned without the consent of the landlord. On the bankruptcy of the tenant, the landlord provided the trustee with notice claiming that the lease was null and void. The trustee relied on s. 52 of the *Bankruptcy Act* to retain the

¹⁴⁶ *Re Rosenzweig* (1921) 2 CBR 255, 70 DLR 174 at para 3 (Que CA).

¹⁴⁷ *Re Rosenzweig* (1921) 2 CBR 255, 70 DLR 174 at para 3 (Que CA).

¹⁴⁸ *Re Rosenzweig* (1921) 2 CBR 255, 70 DLR 174 at para 3 (Que CA).

¹⁴⁹ *Re Rosenzweig* (1921) 2 CBR 255, 70 DLR 174 at para 3 (Que CA).

¹⁵⁰ *Re Rosenzweig* (1921) 2 CBR 255, 70 DLR 174 at para 4 (Que CA).

¹⁵¹ *Re Rosenzweig* (1921) 2 CBR 255, 70 DLR 174 at para 24 (Que CA).

¹⁵² For a similar result see *Re Prima Skirt Co* (1921), 1 CBR 438, 61 DLR 133 (Que SC).

leased premises for the remainder of the unexpired term. Specifically, the trustee relied upon s. 52(5) which gave the trustee rights “notwithstanding the legal effect of any provision or stipulation in any lease.” According to the trustee, this subsection allowed him to ignore the terms of the lease and obtain possession of the premises for the purposes of an assignment of the lease to a third party.

The landlord argued that s. 52 of the *Bankruptcy Act* interfered with “contractual rights” and allowed “the annulment of private contracts.” Thus, s. 52 “legislate[s] on matters affecting civil rights and property...which are constitutionally within the sole jurisdiction of the province.”¹⁵³ The landlord took the position that s. 52(5) of the *Bankruptcy Act* was “illegal and unconstitutional and is *ultra vires* of the powers of the Federal Parliament.”¹⁵⁴ Therefore, under Québec civil law the lease was valid and the decision of the trustee was “illegal and void.”¹⁵⁵

Without citing any authority, the court admitted that the Privy Council had established that Parliament may pass legislation which encroaches upon a provincial field “if such legislation is ancillary” to the federal power. In these circumstances the federal legislation “must prevail.”¹⁵⁶ However, the court concluded that s. 52(5) “is not legislation ancillary nor necessary to the proper and efficacious working of *The Bankruptcy Act*.”¹⁵⁷ The object of bankruptcy legislation was the distribution of property and the discharge of the debtor. Here the provision allowed the trustee to expropriate the

¹⁵³ *In Re Stober* (1923), 4 CBR 34 para 7 (Que SC).

¹⁵⁴ *In Re Stober* (1923), 4 CBR 34 at para 7 (Que SC).

¹⁵⁵ *In Re Stober* (1923), 4 CBR 34 at para 7 (Que SC).

¹⁵⁶ *In Re Stober* (1923), 4 CBR 34 at para 26 (Que SC).

¹⁵⁷ *In Re Stober* (1923), 4 CBR 34 at para 27 (Que SC).

landlord's right so as to increase the assets of the bankrupt at the landlord's expense.¹⁵⁸ The provision was "outside of the bankruptcy domain."¹⁵⁹ The court ruled that s. 52(5) of the *Bankruptcy Act* was "unconstitutional, *ultra vires* of the powers of the Federal Parliament [and] null."¹⁶⁰ Shortly, after this decision Parliament conceded victory to the provinces on this issue by repealing s. 52(5) and replacing it with a section which stated that in the event of a lessee's bankruptcy, the rights and priorities of the landlord would be governed by the laws of the province in which the leased premises were located. The amending Act went further to state that nothing in the *Bankruptcy Act* shall be deemed to limit the legislative authority of any province to regulate landlords' rights.¹⁶¹ An article in *La Revue Du Notariat* welcomed the repeal of the provision noting that s. 52(5) of the *Bankruptcy Act* had interfered with Quebec law.¹⁶²

The outcomes in *Rosenzweig* and *Stober* demonstrate an intention to protect provincial law from federal interference. A third decision, of the Ontario Court of Appeal also took issue with the scope of the federal bankruptcy power.¹⁶³ In *Re Western*

¹⁵⁸ *In Re Stober* (1923), 4 CBR 34 at para 32 (Que SC).

¹⁵⁹ *In Re Stober* (1923), 4 CBR 34 at para 30 (Que SC).

¹⁶⁰ *In Re Stober* (1923), 4 CBR 34 at para 34 (Que SC). See Louis-A Pouliot, "La Loi de Faillite et les Lois Provinciales" (1926-27) 5 R du D 104 at 113.

¹⁶¹ Lloyd Houlden, Geoffrey Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed at para G§124 (WL). See *An Act to Amend The Bankruptcy Act SC 1923*, c 31, s 31. On the provincial legislation that followed this amendment see WJ Tremear, "Rent Priorities in Bankruptcy" (1924-25) 4 CBR 407.

¹⁶² W. Deschênes, "La loi Canadienne des faillites" (1924) 26: 11 Rev du Notariat 321 at 333.

¹⁶³ For a discussion of Ontario relations with the federal government during the 1920s see Christopher Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942* (Toronto: University of Toronto Press, 1981) at 135-146.

Canadian Steel Corp, Chief Justice Meredith¹⁶⁴ offered a critical perspective of the *Bankruptcy Act*. He suggested that there were provisions of the *Bankruptcy Act* that required amendment.¹⁶⁵ In obiter, he challenged the *Bankruptcy Act's* interference with the administration of the courts in the provinces. He pointed to the provisions of the bankruptcy statute which allowed the Minister of Justice to assign judges of provincial courts to exercise their powers under the *Bankruptcy Act*. This enabled the federal government to “cast upon the provinces”¹⁶⁶ the expense of providing courts to carry on work under the *Bankruptcy Act*. He asked: “Is this not an interference with what is by *The B.N.A. Act* within the exclusive legislative authority of the provinces — the administration of justice in the provinces?”¹⁶⁷ Finally, again in *obiter* he suggested that there were some provisions “that are probably *ultra vires* the Dominion Parliament.”¹⁶⁸

B. RIGHTS OF JUDGMENT CREDITORS

The rights of judgment creditors in a bankruptcy demonstrated another critical intersection of the *Bankruptcy Act* and provincial law. As a fundamental principle, s. 11

¹⁶⁴ Meredith CJ's decisions have been analyzed by RCB Risk, “Sir William R Meredith, CJO: The Search for Authority” in G Blaine Baker & Jim Phillips, eds, *A History of Canadian Legal Thought: Collected Essays* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2006) at 179.

¹⁶⁵ *Re Canadian Western Steel Corp* (1922) 2 CBR 494 at para 22 (Ont SC (Appellate Division)).

¹⁶⁶ *Re Canadian Western Steel Corp* (1922), 2 CBR 494 at para 26 (Ont SC (Appellate Division)).

¹⁶⁷ *Re Canadian Western Steel Corp* (1922), 2 CBR 494 at para 27 (Ont SC (Appellate Division)).

¹⁶⁸ *Re Canadian Western Steel Corp* (1922), 2 CBR 494 at para 22 (Ont SC (Appellate Division)). While not finding any provision of the *Bankruptcy Act* to be outside of the bankruptcy and insolvency power Meredith CJ did find that Rule 13 was *ultra vires* of the federal Act at para 19. See also the *Interprovincial Flour Mills v Western Trust Co* (1923), 16 Sask LR 401 (CA) at paras 14-15 (Rule 117 was *ultra vires* of the federal statute). Cf *Eastern Trust Co v Lloyd Manufacturing Co* [1923] 2 DLR 852, 3 CBR 710 (NSSC) (upholding validity of Rule 120) and *Re Nipigon Fibre & Paper Mills* (1922), 3 CBR 408 at para 6, 23 OWN 199 (SC) (upholding validity of Rule 13). Parliament does not have the power “to make rules that are contrary or inconsistent with the Act.” A rule found to be inconsistent with the statute can be declared to be *ultra vires*: Lloyd Houlden, Geoffrey Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed at para K§1 (WL); Ruth Sullivan, *Construction of Statutes*, 6th ed (Toronto: LexisNexis, 2014) at 484.

of the *Bankruptcy Act* established that every assignment and receiving order had precedence over garnishments, attachments, execution or other processes against property.¹⁶⁹ However, the Act carved out an important exception for the rights of secured creditors who had the power “to realize or otherwise deal with his security” notwithstanding the bankruptcy.¹⁷⁰ Could a judgment creditor, who had taken some enforcement steps, such as registration of a judgment against the land of the debtor under provincial law be considered a “secured creditor” in the bankruptcy? In some provinces, the registration of a judgment entitled the creditor to a proprietary interest in the land. In a bankruptcy, would this judgment creditor be able to rely upon provincial law to assert secured creditor status or would the trustee in bankruptcy defeat the creditor’s claim under s. 11 of the *Bankruptcy Act*? Having secured creditor status was essential as it would mean having priority over the trustee in bankruptcy and ranking ahead of unsecured creditors. The scenario provided a classic conflict between provincial law, which gave rise to the proprietary interest, and the *Bankruptcy Act* which took precedence over execution processes.

A 1927 *Canadian Bar Review* article articulated a policy perspective in favour of defeating provincial priority claims. The author argued that the “destruction of judgments as preferred claims”¹⁷¹ was necessary for the equitable distribution of the bankrupt’s assets. The provisions of the *Bankruptcy Act* are:

well within the powers of the Dominion Parliament. Every fictitious lien based on a judgement set up by provincial statutes must necessarily go down before the paramount federal

¹⁶⁹ *Bankruptcy Act*, s 11. For early recognition of this problem see “Seizure by a Judgment Creditor After Assignment in Bankruptcy” (1921-22) 2 CBR 549.

¹⁷⁰ *Bankruptcy Act*, s 6.

¹⁷¹ G Gavan Duffy, “The Value of a Judgment” (1927) 7 Can Bar Rev 405 at 407.

legislation and it is difficult to see how the [Bankruptcy] Act could have been differently drawn to carry out its manifest purposes more effectually.¹⁷²

However, in the early 1920s it was not clear that the courts would adopt this view.

In 1922, the Nova Scotia Supreme Court in *Re Fader* heard one of the first cases to consider the status of registered judgments in a bankruptcy.¹⁷³ Rather than dismissing the judgment creditor's claim for secured creditor status in the bankruptcy, the court gave leave to the judgment creditors to return to court and argue for a declaration of priority on the basis that their registered judgments entitled them to secured creditor status in the bankruptcy.¹⁷⁴ The following year, the Alberta Court of Appeal indicated the uncertainty caused by *Re Fader*:

There has been some question raised as to whether a lienholder, whose lien is created by virtue of a provincial statute and not by contract, should be treated as coming within the meaning of a 'secured creditor,' as defined by the [Bankruptcy] Act.¹⁷⁵

However, this issue was not raised in argument and the Court of Appeal proceeded on the assumption that the plaintiff was a secured creditor.

The meaning of "secured creditor" became a matter of contention in Nova Scotia and New Brunswick. Prior to the enactment of the *Bankruptcy Act*, those provinces had passed legislation providing that a registered judgment became "as effective [as] a lien on the debtor's lands as a registered mortgage."¹⁷⁶ If the courts recognized the registered judgment as a secured creditor then such a claim would have priority over the trustee. In

¹⁷² G Gavan Duffy, "The Value of a Judgment" (1927) 7 Can Bar Rev 405 at 407.

¹⁷³ (1922) 3 CBR 203 (NSSC).

¹⁷⁴ *Re Faber* (1922) 3 CBR 203 (NSSC) at para 10.

¹⁷⁵ *Imperial Lumber Co v Johnson* [1923] 1 WWR 920, [1923] 1 DLR 1125 at 1125 (Alta CA).

¹⁷⁶ *Parker-Eakins Co v Leblanc (Trustee of)* (1922), 3 CBR 211 at para 17 (NSSC).

Parker-Eakins Co. v Leblanc (Trustee of), the creditor had obtained a judgment and registered a certificate judgment in the registry of deeds. When the debtor made an authorized assignment, the creditor argued that he was a secured creditor with valid security that bound the debtor's lands notwithstanding the effect of the *Bankruptcy Act*. In addition to asserting secured creditor status, the creditor also argued that the *Bankruptcy Act* destroyed the effect of his registered judgment under provincial law. According to the creditor, s. 11 of the *Bankruptcy Act*, which gave bankruptcy proceedings priority over execution processes, "was beyond the legislative powers of the Parliament of Canada."¹⁷⁷

Chisholm J. did not accept the creditors' arguments and concluded that the assignment in bankruptcy took precedence over the registered judgment binding lands. A registered judgment against land was not a charge or lien under the Act's definition of secured creditor. A lien mentioned in the definition of secured creditor only meant consensual arrangements between the parties and not a lien created by the "recovery and recording of a judgment."¹⁷⁸ On the constitutional argument, Chisholm J. reasoned that s.11 of the *Bankruptcy Act* was constitutional. Given that the main purpose of the *Bankruptcy Act* was to distribute assets Chisholm J. reasoned that "at every step...there must be an interference with the subject-matter of property and civil rights within the province."¹⁷⁹ Parliament had the power:

¹⁷⁷ *Parker-Eakins Co v Leblanc (Trustee of)* (1922), 3 CBR 211 at para 6 (NSSC).

¹⁷⁸ *Parker-Eakins Co v Leblanc (Trustee of)* (1922), 3 CBR 211 at para 16 (NSSC).

¹⁷⁹ *Parker-Eakins Co v Leblanc (Trustee of)* (1922), 3 CBR 211 at para 21 (NSSC).

to enact, not as ancillary merely to its right to legislate on the subject-matter of bankruptcy but as indispensable to effective legislation, laws as to how creditors' claims shall rank, and how debtors' assets shall be distributed.¹⁸⁰

Russell J. in dissent, concluded that the holder of the registered judgment was a secured creditor and therefore had priority over the trustee. However, in reaching his decision Russell J. expressed his view on the federalism question:

The policy of *The Bankruptcy Act* is, generally, to pay respect to existing provincial legislation. Should we not then say that...the lien of the secured creditor shall be preserved? I think this is the proper answer.¹⁸¹

While the majority in *Parker-Eakins* had given prominence to the *Bankruptcy Act*, a subsequent decision of the Nova Scotia Supreme Court rejected that approach and reached the opposite conclusion. The court *In re Rodenhizer* concluded that a creditor holding a registered judgment was a secured creditor and was therefore entitled to priority in the bankruptcy. The Court emphasized that in this case there was a consent judgment that was obtained as security for the loan meaning that the loan and judgment were obtained at a time when the debtor was solvent. Mellish J. stated that the *Bankruptcy Act* “has to do with the estates of insolvents.”

[The Act's] object is clearly, I think, not to avoid or postpone securities given by solvent persons for present *bona fide* consideration.... Legislation with such an object in view would, I think, come under the exclusive jurisdiction of the local authority and cannot, I think, be said to be ancillary or incidental to legislation on the subject of bankruptcy or insolvency.

It appears in this case the court was seeking to preserve the local practice of using consent judgments in the province. Mellish J. A noted that a consent judgment was an “effective and usual form of security taken by those loaning money to solvent people” in

¹⁸⁰ *Parker-Eakins Co v Leblanc (Trustee of)* (1922), 3 CBR 211 at para 21 (NSSC).

¹⁸¹ *Parker-Eakins Co v Leblanc (Trustee of)* (1922), 3 CBR 211 at para 35 (NSSC).

Nova Scotia. The decisions in *Re Faber* and *Rodnhizer* raised doubts about the interface between provincial legislation, which treated judgment creditors like secured creditor rights, and a bankruptcy. A 1927 article cast doubt on the reasoning of these decisions. Only a proper understanding of the *Bankruptcy Act* “helps clear away the imaginary difficulties”¹⁸² raised by the cases. The author also offered practical advice for prospective lenders: “Money lenders who advance money on a judgment which may be destroyed by bankruptcy instead of insisting on mortgage, which will survive, do so with full knowledge and have no grievance.”¹⁸³ These early lower court decisions did not resolve the issue of registered judgments in a bankruptcy. A Québec case would ultimately provide the Privy Council with its first opportunity to make a twentieth century constitutional pronouncement on the question of whether the *Bankruptcy Act* “infringe[d] upon the provincial property and civil rights jurisdiction.”¹⁸⁴

C. ROYAL BANK v. LARUE

On January 19, 1928, the Privy Council released its judgment in *Royal Bank of Canada v Larue*.¹⁸⁵ Although still a member of the Privy Council, Lord Haldane did not participate in the *Larue* decision, and the overall result emphasized a broad reading of the bankruptcy and insolvency power.¹⁸⁶ The Privy Council relied upon Lord Herschell’s

¹⁸² C Gavan Duffy, “The Value of a Judgment” (1927) 7 Can Bar Rev 405 at 407.

¹⁸³ C Gavan Duffy, “The Value of a Judgment” (1927) 7 Can Bar Rev 405 at 407.

¹⁸⁴ *Royal Bank of Canada v Larue* [1928] AC 187, 8 CBR 579 at para 9 (PC).

¹⁸⁵ *Royal Bank of Canada v Larue* [1928] AC 187, 8 CBR 579 (PC).

¹⁸⁶ *Royal Bank of Canada v Larue* [1928] AC 187, 8 CBR 579 (PC). Viscount Cave, LC, Lord Buckmaster, Lord Carson, Lord Darling, and Lord Warrington of Clyffe were members of the Privy Council that issued *Larue* on January 19, 1928. Lord Haldane’s last judgment was issued on June 12, 1928. See *Roman Catholic School Trustees v The King* [1928] AC 363. Lord Haldane died August 19, 1928. See John T

statement in the *Voluntary Assignments Case* and ruled that the Dominion had the right under the *Bankruptcy Act* to postpone creditors' rights established by provincial law. The case began in 1922 and would take six years before the Privy Council ruled. The lower court rulings in *Larue* demonstrate that a broad reading of the federal bankruptcy power was not a foregone conclusion. The Québec Superior Court, the Québec Court of Appeal and a dissenting judge in the Supreme Court of Canada sought to preserve the Quebec Civil Code from federal interference. Many of the arguments initially raised in the Quebec National Assembly and in the House of Commons can be found in these three judgments.

In March of 1922, the Royal Bank obtained a judgment against the debtor and subsequently registered it. The registration referred to the debtor's real estate and established a judicial hypothec on that property in accordance with the Québec Civil Code. Before the Bank took any steps to enforce the judicial hypothec, the debtor made an assignment under the *Bankruptcy Act*. The Bank subsequently filed a claim with the trustee claiming a "privilege in...the nature of a judicial hypothec upon the real estate of the debtor." The trustee rejected the Bank's claim taking the position that the Bank had no privileged claim and that an assignment in bankruptcy had precedence over the Bank's claim.¹⁸⁷ The trustee relied upon s. 11(10) of the *Bankruptcy Act*, which specifically referred to judgments operating as hypothecs. The subsection provided that after the registration of the debtor's assignment in bankruptcy:

Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 2002) at 182-183.

¹⁸⁷ A summary of the facts is drawn from *Royal Bank of Canada v Larue* [1928] AC 187, 8 CBR 579 (PC). at paras 1-2 and *Quebec (Attorney General) v Bélanger*, [1926] SCR 218 at paras 1-2.

such... assignment shall have precedence of all certificates of judgment, *judgments operating as hypothecs*, executions and attachments against land (except such thereof as have been completely executed by payment).¹⁸⁸

In the Québec Superior Court, the Bank argued that the trustee had misinterpreted s. 11(10) or in the alternative claimed that the provision was unconstitutional as it interfered with the Bank's rights under Québec civil law.¹⁸⁹ Lemieux C.J. ultimately ruled that the Bank was entitled to proceeds from the bankrupt estate up to the amount of its hypothec. His conclusion ultimately rested upon an interpretation of s. 11(10). Lemieux C.J. ruled that s. 11(10) gave the trustee the power to realize upon the property affected by the hypothec but that the creditor holding the hypothec would have a charge over the proceeds.¹⁹⁰

Given his conclusion on the interpretation of the *Bankruptcy Act*, Lemieux C.J. did not rule that the provision was *ultra vires*. However, he did go further and stated that if the subsection were intended to avoid the priority of the bank under the Civil Code, the provision would fail as it would go beyond the scope of the bankruptcy and insolvency power.¹⁹¹ In several bold statements Lemieux C.J. echoed the provincial rights' sentiment found in the Québec National Assembly debates and the repeal debates in the House of Commons. First, he reasoned that the *Bankruptcy Act* did not allow a creditor to be "stripped of his rights" nor did Parliament have the "power to deprive a citizen" of rights acquired under civil law. Neither, "the sovereign nor the British Parliament, nor any

¹⁸⁸ *Bankruptcy Act of 1919*, s 11(10).

¹⁸⁹ *Quebec (Attorney General) v Larue* (1924) 5 CBR 560 at para 9 (Que SC).

¹⁹⁰ This position is summarized by the Privy Council in *Royal Bank of Canada v Larue* [1928] AC 187, 8 CBR 579 (PC) at para 6.

¹⁹¹ Summary of Quebec Superior Court of Justice decision in *Quebec (Attorney General) v Bélanger*, [1926] SCR 218 at 2, Newcombe J.

empire's parliament will have the power to remove an inch or right, however small it is to a citizen.”¹⁹²

The Court of Appeal upheld the decision of the trial judge thus allowing the Bank to keep the proceeds from the sale of the property.¹⁹³ Like the trial judge, Lafontaine C.J. did not rule on the constitutionality of s. 11(10) but he also issued several statements which sought to protect Québec law. First, he noted that the some of the words in s. 11(10) of the *Bankruptcy Act* were unknown in Québec's legal language. Lafontaine C.J. asserted that this was a “dangerous” matter since one could not “with impunity” transplant the legal language of one country and seek to impose them on the legal institutions of another country which had an entirely different legal system.¹⁹⁴ Second, he sought to preserve the rights of the Bank under the Quebec Civil Code. He opposed any interpretation which would allow the *Bankruptcy Act* to have retroactive effect such that a creditor would lose “earned rights under civil law.”¹⁹⁵ The cancellation of a judicial hypothec “has nothing to do with the operation of bankruptcy law.”¹⁹⁶ While the two lower court decisions had decided the case on the interpretation of the *Bankruptcy Act*, both judges indicated that the law would be unconstitutional if the law had encroached upon the rights of creditors holding hypothecs.¹⁹⁷

¹⁹² *Quebec (Attorney General) v Larue* (1924), 5 CBR 560 at para 58 (Que SC) (WL translation).

¹⁹³ *Larue v Royal Bank of Canada* (1925), 40 Que KB 561 (CA).

¹⁹⁴ *Larue v Royal Bank of Canada* (1925), 40 Que KB 561 at para 10 (CA) (WL translation).

¹⁹⁵ *Larue v Royal Bank of Canada* (1925), 40 Que KB 561 at para 9(3) (CA) (WL translation).

¹⁹⁶ *Larue v Royal Bank of Canada* (1925), 40 Que KB 561 at para 9(3) (CA) (WL translation).

¹⁹⁷ Summary of Rinfret J of the two lower court decisions in *Quebec (Attorney General) v. Bélanger*, [1926] SCR 218 at para 50, Rinfret J, dissenting.

The Supreme Court of Canada¹⁹⁸ upheld the trustee's decision thereby disallowing the Bank's claim of the judicial hypothec as a privilege in the bankruptcy. The majority decision, delivered by Newcombe J. upheld s. 11(10) of the *Bankruptcy Act* as coming within the Dominion's power to regulate bankruptcy and insolvency. However, before turning to the majority decision it is important to highlight the dissenting opinion of Rinfret J.¹⁹⁹ who sided with the position of the Royal Bank and held that the "destruction of the judicial hypothec" was not part of the bankruptcy and insolvency power.²⁰⁰ Rinfret J. concluded that the Royal Bank, through its hypothec, had acquired the status of secured creditor under the *Bankruptcy Act*.²⁰¹ Secured creditors remained "entirely outside the bankruptcy proceedings."²⁰² Therefore the bankrupt's property did not include property affected by the hypothec.²⁰³ Rinfret J. was of the view that once the hypothec had been registered the Royal Bank acquired a real right in the designated building.²⁰⁴ Section 11(10) of the *Bankruptcy Act* did not provide the intention to "deprive a citizen of a completed and acquired right."²⁰⁵ If hypothecs were only to be

¹⁹⁸ *Quebec (Attorney General) v Bélanger* [1926] SCR 218.

¹⁹⁹ One Quebec lawyer would later call Rinfret J.'s dissent a "masterpiece of legal argument". Alexandre Gérin-Lajoie, "Démolisseurs! Pour ne pas dire pire" (1927-28) 6 R du D 449 at 451. Original French: "la dissidence lumineuse est un chef-d'oeuvre d'argumentation légale." [translation by author].

²⁰⁰ *Quebec (Attorney General) v Bélanger* [1926] SCR 218 at para 54, Rinfret J, dissenting.

²⁰¹ *Quebec (Attorney General) v Bélanger* [1926] SCR 218 at para 28, Rinfret J, dissenting.

²⁰² *Quebec (Attorney General) v Bélanger* [1926] SCR 218 at para 28, Rinfret J, dissenting (WL translation) citing *Riordon v Danforth Co* [1923] SCR 319 at 333.

²⁰³ *Quebec (Attorney General) v Bélanger* [1926] SCR 218 at para 31, Rinfret J, dissenting (WL translation).

²⁰⁴ *Quebec (Attorney General) v Bélanger* [1926] SCR 218 at para 40, Rinfret J, dissenting.

²⁰⁵ *Quebec (Attorney General) v Bélanger* [1926] SCR 218 at para 47, Rinfret J, dissenting (WL translation).

valid when the debtor was solvent their protection for creditors would only be illusory. Hypothecs only had any real utility to creditors when the debtor became insolvent. If the trustee was correct and the Bank's claim was disallowed, it would effectively remove hypothecs from the Civil Code.²⁰⁶

Turning to the constitutional question, Rinfret J. concluded that the annulment of a judicial hypothec before the debtor became insolvent did not have an "essential relationship" to the bankruptcy and insolvency power. The federal interference with the hypothec was not a "necessary consequence" of bankruptcy and insolvency. Section 11(10) was not "strictly related to the subject" of bankruptcy or insolvency. Nor was the provision ancillary to bankruptcy and insolvency. The federal provision was not necessary for the Dominion Parliament to exercise its bankruptcy power given that it destroyed the Bank's rights.²⁰⁷ What concerned Rinfret J. was that the Bank had acquired certain rights under provincial law prior to the bankruptcy. He concluded that those parts of s. 11(10) that had the effect of destroying the judicial hypothec were not part of the federal bankruptcy power.²⁰⁸

The majority of the Supreme Court of Canada came to the opposite conclusion and held that s. 11 was unconstitutional. For the majority, Newcombe J. began his constitutional analysis by referring back to the two classic nineteenth statements of the broad bankruptcy power found in *Cushing v Dupuy*²⁰⁹ and the *Voluntary Assignments*

²⁰⁶ *Quebec (Attorney General) v Bélanger* [1926] SCR 218 at para 49, Rinfret J, dissenting.

²⁰⁷ *Quebec (Attorney General) v Bélanger*, [1926] SCR 218 at para 54, Rinfret J, dissenting (WL translation).

²⁰⁸ *Quebec (Attorney General) v Bélanger*, [1926] SCR 218 at para 58-59, Rinfret J, dissenting.

²⁰⁹ *Cushing v Dupuy* (1880), 5 App Cas 409 at 415-416, cited in *Quebec (Attorney General) v Bélanger* [1926] SCR 218 at para 14, Newcombe J.

Case.²¹⁰ In particular, he emphasized Lord Herschell’s statement in the *Voluntary Assignments Case* that bankruptcy legislation “required ancillary provisions for the purpose of preventing the scheme of the Act from being defeated.”²¹¹ Newcombe J. concluded that the *Voluntary Assignments Case* “clearly recognizes the necessity of” including within a bankruptcy statute provisions like s. 11(10):

[F]ollowing the view expressed by their Lordships, I hold that these enactments belong or have strict relation to the subject of bankruptcy and insolvency, and are therefore, as provisions of *The Bankruptcy Act*, within the paramount authority of Parliament.²¹²

Newcombe J. allowed the appeal of the trustee and ordered that the trustee’s disallowance of the Bank’s claim should be restored. The Bank appealed to the Privy Council and for one Quebec author “the very existence of the judicial hypothec in our Civil Code “was at stake.”²¹³ The Attorney General of Quebec and the Attorney General of Canada intervened.²¹⁴

The Bank’s appeal of the Supreme Court judgment provided the first opportunity for the Privy Council to render a decision on the bankruptcy power in the twentieth century. The Board agreed with the Supreme Court of Canada’s conclusion.²¹⁵ Viscount Cave, the Lord Chancellor, rendered the decision and he posed two questions:

(1) whether on a proper interpretation of the *Bankruptcy Act* a registered judicial hypothec under Quebec Civil Code is intended to be postponed to an assignment in bankruptcy.

²¹⁰ *Ontario (Attorney General) v Canada (Attorney General)*, [1894] AC 189 at para 27 (PC), cited in *Quebec (Attorney General) v Bélanger* [1926] SCR 218 at para 16, Newcombe J.

²¹¹ *Ontario (Attorney General) v Canada (Attorney General)*, [1894] AC 189 at para 27 (PC), cited in *Quebec (Attorney General) v Bélanger*, [1926] SCR 218 at para 16, Newcombe J.

²¹² *Quebec (Attorney General) v Bélanger*, [1926] SCR 218 at para 17, Newcombe J.

²¹³ “Hypothèque judiciaire” (1925-26) 4 R du D 571 at 572

²¹⁴ L.P. “Hypothèque judiciaire” (1927-8) 6 R du D 380.

²¹⁵ *Royal Bank of Canada v Larue* [1928] AC 187, 8 CBR 579 (PC).

(2) If such a hypothec is postponed by a provision of the Bankruptcy whether such provision is “within the legislative authority of the Dominion Parliament.”²¹⁶

On the first question, the Privy Council concluded that the *Bankruptcy Act* did postpone a judicial hypothec on the real estate of the debtor. It was the intention of the *Bankruptcy Act* that the assignment in bankruptcy should have precedence of all judgments operating as hypothecs.²¹⁷

The Privy Council in *Larue* broadly stated the bankruptcy power and concluded that judgment creditors were reduced to an equality in a bankruptcy:

[T]heir Lordships are of opinion that the exclusive authority thereby given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment. A creditor who has obtained judgment for his debt and has issued execution upon the debtor’s lands or goods remains a creditor; and it is entirely within the authority of the Dominion Parliament to declare that such a creditor...shall on the occurrence of bankruptcy...be reduced to an equality with the general body of creditors.²¹⁸

The Privy Council went further and stated that there was nothing in the nature of a Québec judicial hypothec which exempted it from the impact of the federal bankruptcy statute:

No doubt it was within the competence of the provincial Legislature to give to a judicial hypothec the quality of a real right; but if and so soon as that enactment comes into conflict with a Dominion statute duly passed under the authority of sec. 91 of the Act of 1867, then the Dominion statute prevails over the provincial legislation and takes effect according to its tenor.²¹⁹

To support this conclusion Viscount Cave L.C. quoted Lord Herschell’s now well-worn passage from the *Voluntary Assignments Case*.²²⁰ According to Viscount Cave, “Lord

²¹⁶ *Royal Bank of Canada v Larue* [1928] AC 187, 8 CBR 579 at para 2 (PC).

²¹⁷ *Royal Bank of Canada v Larue*, [1928] AC 187, 8 CBR 579 at para 6 (PC).

²¹⁸ *Royal Bank of Canada v Larue*, [1928] AC 187, 8 CBR 579 at para 12 (PC).

²¹⁹ *Royal Bank of Canada v Larue*, [1928] AC 187, 8 CBR 579 at para 13 (PC).

²²⁰ *Ontario (Attorney General) v Canada (Attorney General)* [1894] AC 189 (PC) at para 27, cited in *Royal Bank of Canada v Larue*, [1928] AC 187, 8 CBR 579 at para 11 (PC).

Herschell's judgment shows clearly that such an execution [the judicial hypothec] may lawfully be postponed by the Dominion Act."²²¹ Looking back to the nineteenth century Viscount Cave effectively entrenched Lord Herschell's once *obiter* statement as part of Canadian constitutional law. As a result the Privy Council upheld the trustee's original decision to dismiss the Bank's claim.

The reaction to *Larue* in Quebec was not positive.²²² Within weeks of the decision a Barrister of the Montreal Bar rose in the Quebec National Assembly demanding that Parliament amend the *Bankruptcy Act* to allow judicial hypothecs to be recognized in a bankruptcy.²²³ In 1928, the *Revue du Droit* published "Démolisseurs!" in which Alexandre Gérain-Lajoie, a Quebec lawyer, condemned *Royal Bank v Larue* as destructive to Quebec civil law:²²⁴

This disastrous, literally inexplicable decision made one more, broader blow in the barrier of protection that surrounded our provincial law. It was already quite damaged. It falls, of course, into ruins and no longer offers any security: how could one place its trust in it?²²⁵

However, for British constitutional scholar Arthur Berriedale Keith the outcome in *Larue* was much more acceptable and perhaps inevitable. Whether the *Bankruptcy Act*

²²¹ *Royal Bank of Canada v Larue*, [1928] AC 187, 8 CBR 579 at para 12 (PC).

²²² "Hypothèque judiciaire" (1927-8) 6 R du D 380 (Privy Council had overturned dissenting judgment of Rinfret J in the Supreme Court of Canada as well as overturning judgments from the Quebec Court of Appeal and Quebec Superior Court).

²²³ "Hypothèque judiciaire" (1927-8) 6 R du D 380 at 380-381 (reporting that Alédéric Blain raised the matter on February 22, 1928).

²²⁴ Alexandre Gérain-Lajoie, "Démolisseurs! Pour ne pas dire pire" (1927-28) 6 R du D 449. Démolisseurs translates into demolishers or wreckers.

²²⁵ Alexandre Gérain-Lajoie, "Démolisseurs! Pour ne pas dire pire" (1927-28) 6 R du D 449 at 464. Original French: "Cette décision néfaste, littéralement inexplicable, fait une brèche de plus, et large, dans la barrière de protection qui entourait notre droit provincial. Celle-ci était déjà assez endommagé pourtant. Elle tombe, évidemment, en ruines et n'offre plus aucune sécurité: comment pourrait-on y mettre sa confiance?" [translated by author].

could interfere with provincial legislation “seems obviously in the affirmative.”²²⁶ The Privy Council had “already asserted...that the Dominion could deal with the effect of an execution on property under a Dominion bankruptcy law”²²⁷ in the *Voluntary Assignments Case*. That answer, however, was not obvious to many prior to 1928 and perhaps to some even after *Larue*.²²⁸

VII. CONCLUSION

The absence of an established bankruptcy bar made it challenging for a legal community approaching a bankruptcy statute for the first time. But understanding and interpreting the new Act was only part of the problem. In 1919, Parliament was reasserting its jurisdiction in bankruptcy after nearly forty years of provincial regulation of debtor-creditor law. The abrupt change to federal law meant that the new legislation would come under attack for interfering with established provincial law. This set the stage for both political opposition and constitutional challenges to the new paradigm of federal bankruptcy law. The political debates reflected a belief that Parliament had not achieved an adequate balance between federal and provincial rights in the *Bankruptcy Act*. Rather than relying upon the new federal law, Saskatchewan and Alberta proceeded

²²⁶ Berriedale Keith, “Notes on Imperial Constitutional Law” (1928) 10 J Comp Legis & Int’l L (3rd) 293 at 308.

²²⁷ Berriedale Keith, “Notes on Imperial Constitutional Law” (1928) 10 J Comp Legis & Int’l L (3rd) 293 at 308.

²²⁸ Perhaps *Larue* could never bridge the gap between these two views. In Quebec, the notion that federal bankruptcy law interfered with the Civil Code, continued well after 1928. See Rosalie Jukier & Roderick A. Macdonald, “The New Quebec Civil Code and Recent Federal Law Reform Proposals” (1992) 20 Can Bus LJ 380 at n 89 (Privy Council’s refusal to recognize judicial hypothec in *Larue* demonstrates that the federal Bankruptcy Act “has never been particularly sensitive to the intellectual structure of the civil law”); See Pierre Carignan, “La Competence Legislative en Matiere de Faillite et d’Insolvabilite” (1979) 57 Can Bar Rev 47 at 73 (recommending that the provinces should be given jurisdiction over personal bankruptcies).

to enact their own debtor relief legislation in response to the regional economic crisis in those two provinces. The demand for repeal by Québec National Assembly and some Québec MPs reflected a strong provincial rights perspective. The new *Bankruptcy Act* and the federal bankruptcy power threatened provincial law, which had been dominant over the preceding forty years. When constitutional litigation arose, early cases illustrated that there was not an overwhelming acceptance of a broad bankruptcy and insolvency power and the resolution of this constitutional question was not certain as the decade progressed.

The Privy Council’s decision in *Royal Bank v Larue* ruled in favour of a broad bankruptcy power. *Larue* continued to have influence at the end of the decade.²²⁹ In 1929, the Supreme Court of Canada²³⁰ cited *Larue* and quoted at length from the *Voluntary Assignments Case*.²³¹ By 1932, the leading bankruptcy text, *Bankruptcy in Canada*, 2nd ed., by Lewis Duncan and W.J. Reilley, had inserted *Larue* into their chapter, “Bankruptcy and Insolvency under the Canadian Federal System” following

²²⁹ However, the question of the legal relationship between judgment creditors and bankruptcy did not disappear. The Supreme Court of Canada decision in 1959 revisited this issue in *Canadian Credit Men's Trust Assn. v. Beaver Trucking Ltd*, [1959] SCR 311. The enactment of modern judgment enforcement legislation in some provinces again raises the issue of the status of a registered judgment in a bankruptcy. See RCC Cuming, “Priority Competition between Secured and Unsecured Creditors: The Evolution of Policy” (2015) 30 BFLR 457.

²³⁰ *Canadian Men’s Trust Association v Hoffer Limited* [1929] SCR 180, 10 CBR 374. See also *R v Leach* (1929), 11 CBR 214 (NSSC) (although the court did not cite *Larue* at para 12, the court adopted a broad conception of the bankruptcy power).

²³¹ Since 1929 *Larue* has become part of Canadian constitutional law. The Supreme Court of Canada in two judgments referred to *Larue* as a seminal case: *Husky Oil Operations Ltd v Minister of National Revenue* [1995] 3 SCR 453 at para 9; *Deloitte, Haskins & Sells Ltd v Alberta (Workers' Compensation Board)* [1985] 1 SCR 785 at para 28. It has also been cited by the Supreme Court of Canada in *Reference re Companies' Creditors Arrangement Act (Canada)* [1934] SCR 659 at para 4; *Re Gingras automobile Ltée* [1962] SCR 676 at para 7; *Canadian Credit Men's Trust Association v Beaver Trucking Ltd* [1959] SCR 311 at para 22. It has also featured in provincial appellate courts. See e.g. *Toronto-Dominion Bank v Phillips*, 2014 ONCA 613 at para 27; *Re James*, 2002 BCCA 179 at para 22; *Re Sklar* (1958), 26 WWR 529, 15 DLR (2d) 750 (Sask CA) at para 7, 10-12.

their discussion of *Cushing v Dupuy* and the *Voluntary Assignments Case*. For the authors, there appeared to be a natural progression from the nineteenth century jurisprudence to *Larue*. Reading that text and its summary of leading appellate cases, one misses the doubt that surrounded the conflict between provincial rights and the federal bankruptcy power in the 1920s.²³²

²³² The 1920s demonstrates that there will be an inevitable and ongoing clash between the bankruptcy power and provincial law. See Roderick Wood, “The Paramountcy Principle in Bankruptcy and Insolvency Law: The Latest Word (2016) 58 CBLJ 27 discussing *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53, [2015] 3 SCR 419; *Alberta (Attorney General) v Moloney*, 2015 SCC 51, [2015] 3 SCR 327; *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, [2015] 3 SCR 397.